No. 75-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

E. I. DU PONT DE NEMOURS AND COMPANY, AND PPG INDUSTRIES, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

REPLY TO BRIEF IN OPPOSITION

DANIEL M. GRIBBON
ALLAN J. TOPOL
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners E. I. Du Pont de Nemours and Company, and PPG Industries, Inc.

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1602

E. I. DU PONT DE NEMOURS AND COMPANY, AND PPG INDUSTRIES, INC., *Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

Petitioners do not, as EPA asserts (Br. 22), ask that the Court make a factual examination of a lengthy administrative record. What they do ask is that the Court resolve three important questions of law:

> (1) Did the Administrator, in rushing to decision to meet a court-imposed deadline, provide the notice and opportunity to comment that are essential to proper administrative rulemaking?
>
> (2) Did Congress delegate to the Administrator, as a majority of the court below held, authority to act on the basis of speculation, theoretical extrapolation and a slight or non-existent data base?

(3) Did the Court of Appeals, in sustaining the Administrator's action by a 5-4 margin, observe the standard of review intended by Congress and prescribed by decisions of this Court?

(1) The Administrator's failure to afford petitioners due process, *i.e.*, notice of and an opportunity to comment on the evidence he principally relied on, cannot be dismissed as "a factual disagreement not warranting further review." (Br. 26)[1] The issue is not factual but whether due process and the Administrative Procedure Act require "that the Administrator, before arriving at his decision, publicly identify the recently received studies and comments on which he intended to rely" and provide an opportunity to comment on that material. (Wright Op. 107) The majority, in sustaining the Administrator's action, answered this question in the negative.

The sharp disagreement between the majority and the dissent on this issue raises an important question of federal law that this Court should resolve. Increasingly EPA and other federal agencies are involved in informal rulemaking on matters that turn peculiarly upon scientific and medical evidence. The right to be advised of and to comment upon the evidence consid-

[1] EPA implies that the Court's order compelling a final decision within 30 days did not affect its procedure. (Br. 5, 6) The facts are otherwise. On July 3, 1973, EPA opposed NRDC's motion for a court order on the ground that the agency was "attempting to make a good faith evaluation of the materials presented." On October 1, 1973 EPA responded to a show cause order by explaining that the agency had solicited comments from the appropriate federal agencies and that the Administrator wanted to consider these comments before making a final decision. EPA offered to notify the court immediately of the Administrator's decision. But this was not sufficient to forestall entry of the 30-day order.

ered critical by the agency, before the administrative determination is reached, must be preserved if the constitutional requirement of "an opportunity to participate" in such determination, codified in Section 553 (c) of the Administrative Procedure Act, is to have substantative meaning.

(2) The scope of the authority delegated by Congress to the Administrator is a matter that requires decision by this Court. Petitioners do not urge that the Administrator must sustain "an impossible burden of proof" or that he must have "precise, quantifiable and conclusive proof of facts" before he can act. (Br. 18, 14) Rather, the issue for decision is whether Congress intended that a finding by the Administrator that the use of lead additives in gasoline "will endanger the public health" be based on scientific and medical evidence, or whether Congress contemplated action on the basis of essentially the same apprehension and uncertainty that caused it to authorize the Administrator to inquire into the relevan vidence. In sustaining the Administrator's action, the majority of the Court below has held that Congress delegated to him authority to act on the basis of "speculation, conflicts in evidence, and theoretical extrapolation" found in "a slight or non-existent data base." (Wright Op. 47)

(3) Seven members of the Court below were in substantial agreement, as EPA asserts (Br. 21), as to the appropriate standard of review of the Administrator's action. But four of those members, applying this standard, declined to sustain the Administrator's action. Two members of the requisite majority of five went along on grounds that the EPA makes no effort to justify. Instead EPA contends that "the extent of the disagreement among the majority is too uncertain

to warrant review by this Court," and EPA asserts that "even Judge Leventhal. . . was uncertain whether Judge Bazelon was advocating a difference in degree of substantive review or a difference in kind." (Br. 20)

There is, however, no uncertainty as to the position of Judges Bazelon and McGowan. They concurred in the majority opinion because it "would bar" a "close analysis of the evidence;" and they found the majority's analysis of the evidence "unnecessary." (Bazelon Op. 4) Accordingly, EPA's assertion that on the basis of the analysis of the evidence engaged in by the other judges, "Judges Bazelon and McGowan were sufficiently familiar with the substantive evidence to allow them adequately to determine whether the Administrator's action was arbitrary and capricious" is wholly speculative and immaterial. (Br. 21) Their concurrence rests on a conviction that it was unnecessary to examine that evidence.

Alternatively, on the matter of proper judicial review EPA argues that "even if the position espoused by Judges Bazelon and McGowan was as starkly at odds with the views of the rest of the court as has been suggested, seven of the nine judges on the court now appear to be in unqualified agreement as to the reviewing court's responsibility." (Br. 21) But it is precisely because only seven of the nine judges performed the proper role of judical review that certiorari should be granted. Four of those seven judges (a majority) who did observe the proper standard of judicial review were unwilling to sustain the Administrator's action.

The decision of the court below thus raises, and fails to resolve satisfactorily, serious legal questions with

respect to congressional intention in authorizing economic regulatory programs, and agency procedure and judicial review in the implementation of such programs. These important questions warrant consideration and resolution by this Court.

Respectfully submitted,

DANIEL M. GRIBBON
ALLAN J. TOPOL
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioners
E. I. Du Pont de Nemours and Company, and PPG Industries, Inc.

Of Counsel:
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006